No. 11180

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ, as executor and executrix of the last will and testament of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee's brief attempts to obscure the controlling elements of this case and requires no reply other than a correction of some of the misapprehensions created therein. Appellant's Opening Brief is otherwise ample answer, and he will not incumber the record by its reiteration.

Summarizing, Appellant will confine himself, in this reply, to the following points:

1. There is no issue in this case with respect to Question 29 of Part II.

2. The California Insurance Code imposes upon the "insurer" *the duty of making investigation* of that which

it has "the means of ascertaining" and which "in the exercise of ordinary care" it "ought to know." It is "presumed" and "bound to know" that which is "equally" open to its "inquiry." Its right to information of the material facts is "waived" by its "neglect to make inquiries as to such facts," particularly "where they are distinctly implied in other facts of which information is communicated."

3. No false representation was made and nothing was concealed from appellee.

4. Appellant, neither in fact nor in legal contemplation, adopted "as his own" the statements of Abe Lutz in Part II.

5. Appellee cannot have its cake and eat it too.

6. Appellee concedes that the testimony of attending physicians of Abe Lutz with respect to the latter's statements to said physicians, including all subjective symptoms, were hearsay as to appellant.

7. The defenses of waiver and estoppel compel reversal of the trial court's judgment.

I.

There Is No Issue in This Case With Respect to Question 29 of Part II.

Appellee has injected a false issue in this case. Appellee's amended complaint does not allege that the whole or any part of the answer of the "insured" to question 29 in Part II (requesting full description of illnesses, diseases or injuries and since childhood) contains either any concealment or any false representation [I, 2, 17].

The issues in this connection are tendered by Paragraph IX of the amended complaint [I, 6, 9] and are joined, without aider of said complaint, by Paragraph IX of Appellant's answer [I, 24-26].

While said complaint alleges that Abe Lutz, the so-called "insured," gave and stated all the answers to all the questions in said Part II with intent to deceive appellee "in answer to *certain* of the questions" (emphasis added), nevertheless, said complaint identifies said "*certain* of the questions" with a particularity which excludes said question 29 of said Part II.

Said complaint alleges, and there is no aider thereof in appellant's answer, that the alleged false representations and concealment relied upon by appellee to vitiate the policy are with respect to *only* questions 35, 36 and 44 [I, 8, 9].

This is emphasized by Paragraph X of said complaint [I, 9-10], which alleges that appellee did not know that

"said representations" and "said answers" were false and untrue and that had it known

> "that within *one* year preceding the date of said application for said insurance, said Abe Lutz [appellant's father, the so-called "insured"] had consulted a physician and been treated by a physician for *pains in the chest, dizziness, shortness of breath* and *palpitation of the heart,* and had plaintiff known that Abe Lutz had in fact *suffered from dizziness* and *fainting spells, palpitation of the heart, shortness of breath, pains and pressure in the chest,* it would not have issued said policy of life insurance." (Emphasis added.) etc.

This is again demonstrated in Paragraph XIII of said complaint [I, 11-13] which alleges, in so far as is here pertinent, that "after the death of said Abe Lutz * * *, and * * * receipt * * * of proofs of death * * *, plaintiff * * * first * * * received information leading it to * * * an investigation * * * to determine whether said answers were true, * * *

> "That as a result of said investigation and examinations plaintiff company first learned that * * * said Abe Lutz had, prior to the date of said application for said insurance, suffered from, had consulted a physician for, and been examined by a physician for indigestion, dizziness and fainting spells, palpitation of the heart, shortness of the breath and pains and pressure in the chest and had, within approximately one year prior to the date of said application and other than in August, 1942, consulted a physician and been treated by a physician for, and had suffered from each and all of the ailments hereinabove *particularly described* and alleged." (Emphasis added.)

The Issues.

In this connection, the amended complaint alleges, and appellant's answer denies that his father, Abe Lutz:

A. In or by his answers in his medical examination referred to in the application (part 1) for insurance as "Part 2," falsely or fraudulently represented to appellee that he:

1. Had never suffered from:
   (a) Indigestion;
   (b) Insomnia;
   (c) Nervous strain or depression;
   (d) Overwork;
   (e) Dizziness or fainting spells;
   (f) Palpitation of the heart;
   (g) Shortness of breath;
   (h) Pain or pressure in the chest.

2. Had not consulted or been treated or examined by any physician or practitioner other than Dr. Maurice H. Rosenfeld in August, 1942, and for a physical examination and blood sugar determination, with normal result, *within five years* immediately preceding November 14, 1942, the date of said application.

B. Falsely or fraudulently concealed the fact that he had consulted and been treated by physicians:

1. Within *five years* prior to November 14, 1942, the date of said application, for:
   (a) Dizziness or fainting spells;
   (b) Palpitation of the heart;
   (c) Shortness of breath;
   (d) Pain or pressure in the chest.

2. In January, 1937, for nausea and dizziness;
3. In June, 1942, for pains in the chest;
4. In July, 1942, for
   (a) Dizziness or nausea;
   (b) Pains in the chest;
   (c) Indigestion;
   (d) Palpitation of the heart;
   (e) Various ailments and diseases.

It will be noted that "various ailments and diseases" last above mentioned as subdivision "(e)," although broad and conprehensive to infinity, is, nevertheless, limited to the month of *July, 1942,* during which month, as will be hereinafter disclosed, Abe Lutz saw only one doctor, Dr. Rosenfeld, and saw him only once, to wit, on July 6, 1942, with no complaints whatsoever [I, 115]. Even on this date, July 6, 1942, the doctor had made no definite diagnosis of any ailment or disease and certainly no diagnosis of any heart condition, and in his private thinking with respect to Abe Lutz' condition, only had suspicions; he "suspected the possibility" of a heart condition [I, 116] but he did not tell Abe Lutz what he "suspected" nor what his conclusions were [I, 117], explaining that his conclusions based on his suspicions were "just for my own information and a follow-up for further diagnostic evidence" [I, 117].

Duodenal Ulcer, Coronary Thrombosis, and the "Tentative" "Suspicion" of Dr. Rosenfeld That It Was "Probable" That Abe Lutz Had Mild Angina Pectoris Have No Relevancy, and Are Foreign, to Any Issue in This Case.

DUODENAL ULCER:

Just before Abe Lutz died, "he was sent to the hospital because he had an acute duodenal ulcer; that is, an ulcer of the stomach" [I, 120]. Duodenal ulcer was one of the contributing causes of death [II, 420]. Appellant's father had been afflicted with said duodenal ulcer slightly over two months prior to his death [II, 420]. In other words, the insured did not become so afflicted until well over a year after the effective date of the policy. He did not have such an ulcer when the application was signed [II, 420].

CORONARY THROMBOSIS:

This was the *"immediate contributing" cause* of the death of Abe Lutz [I, 119]. Appellant's father was so fatally stricken *only* "several hours" or "immediately preceding his death" [I, 143]. According to the death certificate, Abe Lutz had been so afflicted one day [II, 420]. In other words, Abe Lutz did not acquire this affliction until well over nineteen months after the effective date of the policy. Dr. Rosenfeld, the sole author of this diagnosis, testified that normal, healthy appearing people suffer from *fatal* attacks of coronary thrombosis without any previous symptoms thereof [I, 143], and that in all of the examinations that he, Abe Lutz' attending physician, made, from the first time Abe Lutz became his patient up until the fatal attack (a period of over 7 years, *i. e.*,

from 1-16-37 to 5-28-44), there were no symptoms, subjective or objective, which could be ascribed to coronary thrombosis [I, 144]. In short, Abe Lutz did not have coronary thrombosis when the application was signed on November 14, 1942.

Angina Pectoris, or "Mild Angina Pectoris":

This is irrelevant and foreign to any issue in this case for at least four reasons, to wit:

1. As elaborated in points "(a)" and "(b)," pages 21 to 28 of appellant's opening brief, Abe Lutz the socalled "insured" is not a party to the contract of insurance and neither the policy nor the law provide that appellant's rights in the premises are predicated upon the conduct of the insured.

2. Neither any alleged falsity nor any alleged concealment in the answers of Abe Lutz to question 29 in Part II (requesting full description of ailments, diseases or injuries had since childhood) is in issue in this case as is hereinabove explained.

3. There is no evidence in the record that as of any date subsequent to August 11, 1942 (over three months prior to the date of the application) and prior to April 7, 1944 (when Dr. Rosenfeld next saw Abe Lutz after August 11, 1942), there was any diagnosis, qualified or unqualified, or either angina pectoris or "mild angina pectoris." While, over appellant's objection [I, 122-123], Dr. Rosenfeld stated that it was his "belief," *in retrospection,* that Abe Lutz had angina pectoris during the period between November 1, 1942 and December 9, 1942 [I, 122-123], nevertheless, he neither saw Abe Lutz nor prescribed any

medicine for him during the entire period of over nineteen months between August 11, 1942, and April 7, 1944 [I, 143-144]. Further, the above mentioned testimony of Dr. Rosenfeld, made *in retrospection,* after the death of said Abe Lutz, should have been, and the trial court thought that it was excluded and expunged from the record as is demonstrated by the statement of the court to that effect in the court's opinion where, speaking of evidence elicited from Dr. Rosenfeld, Judge Jenny said:

> "The testimony limits the information obtained by Dr. Rosenfeld from the deceased (Abe Lutz) to that period of time prior to November 16, 1942." [I, 355.]

Inasmuch as there is no competent evidence with respect to any unfavorable state of the health of Abe Lutz when the application was *approved* and the first premium thereon was *paid,* it therefore follows that the *after death* diagnosis of angina pectoris is irrelevant and foreign to appellee's claim that when the application was approved and the first premium thereon was paid that Abe Lutz was not in good health.

4. There was no diagnosis of angina pectoris until after the death of Abe Lutz [II, 420]. Dr. Rosenfeld, the sole author of that *ultimate* diagnosis, first acquired "suspicions" that Abe Lutz had "mild angina pectoris" on June 1, 1942; the symptoms "were very mild" [I, 136]. Angina pectoris was only "suspected" [I, 107], and it was Dr. Rosenfeld's policy not to make any statements which would make the patient unduly apprehensive when he found a

condition involving a *suspician* of heart infirmity [I, 119, 135], and in lieu thereof he told Abe Lutz about the latter's "potential diabetic condition" [I, 107] and prescribed nitroglycerine [I, 106], sometimes prescribed for high blood pressure [I, 135], for relief of the pain of the *suspected* mild angina pectoris [I, 106, 137] and advised curtailment of activities and reduction of weight by diet "to improve this potential diabetic condition" [I, 106, 137]. The doctor's *unrevealed* "suspicions" on June 1, 1942, were tentative only [I, 137]. Those suspicions were "*probably* angina pectoris, *probably* due to the coronary artery narrowing," which latter narrowing, the doctor thought, was "*probably* progressive" [I, 106] (The emphasis on the three appearances of the word "probably" in the two phrases last above quoted is of course added). Based on "very mild" symptoms [I, 136] and *probabilities,* the doctor only had "tentative" "suspicions" of "mild angina pectoris." Even this tentative *suspicion* the doctor did not reveal to Abe Lutz, who was merely reminded by the doctor "to improve this potential diabetic condition" [I, 106, 137].

Even as late as July 6, 1942, the fourth time Abe Lutz was seen by Dr. Rosenfeld after June 1, 1942, the doctor reserved any diagnosis, and in answer to the question

> "On July 6, 1942, did you tell the patient what your diagnosis and conclusions were?"

he answered,

> "No, sir, that was just for my own information and a followup for further diagnostic evidence" [I, 117].

Dr. Rosenfeld merely revealed his "suspicion" [I, 117]. Dr. Rosenfeld then explained that it was possible for a person to have mild angina pectoris and thereafter effect a *complete recovery,* and that many times a person will have all the symptoms and, over a period of time and treatment, effect a complete recovery [I, 149].

On August 7, 1942, the next visit of Abe Lutz to Dr. Rosenfeld, Mr. Lutz had no complaints. "The examination and the discussion on that day was primarily referrable to the patient's diabetic problem." Mr. Lutz was told "that his blood sugar was essentially normal" [I, 118].

On August 11, 1942, the next visit of Abe Lutz with Dr. Rosenfeld and the last time the doctor saw Mr. Lutz before April 7, 1944 when the latter was stricken with his fatal illness [I, 144], Mr. Lutz had no complaints. The doctor testified that although his *suspicion* was the same, nevertheless "there was no increase in impairment" [I, 118]. It is to be noted that even on this late date there was still no definite diagnosis or certainty of Abe Lutz' affliction which the doctor, even on this last visit prior to the fatal illness of Abe Lutz, referred to as "the condition I suspected" [I, 118]. Additionally, Dr. Rosenfeld testified, the over-all picture was that the patient was improving; he was better; he had improved [I, 141]. Mr. Lutz had recovered from the pain [I, 150]. His appearance was that of a normal appearing man in every way [I, 144].

The first and only diagnosis of angina pectoris is the one made by Dr. Rosenfeld after the death of

Abe Lutz, when, in retrospection and realization that "an acute coronary thrombosis" was "the immediate contributing cause" of the patient's death [I, 119], he signed the certificate of death [II, 420].

The *unalleged,* but now, by appellee, claimed concealment of affliction with angina pectoris, or "mild angina pectoris," is not an issue in this case because when Part II was signed no one was competent to determine the fact as to whether Abe Lutz was so afflicted, other than a medical expert, Dr. Rosenfeld in the instant case, and with him, even in his own private thinking, said affliction was not a fact and remained only a *suspicion* until death by reason of another affliction, to wit, coronary thrombosis, as the "immediate contributing" cause, occurred.

It is pertinent, at this point, to point out the fact that under the law even a *party* to a contract of insurance is not bound to communicate to the other, *even upon inquiry,* information of his own *judgment* upon the matters in question. We refer to and quote California Insurance Code, Sec. 339, to wit:

> *"Information of party's own judgment.* Neither party to a contract of insurance is bound to communicate, *even upon inquiry,* information of his own judgment upon the matters in question." (Emphasis added.)
>
> *California Insurance Code,* Sec. 339.

It is unfair, after the lips of Abe Lutz are sealed by death, and it would offend all principles of equity, to assert that Abe Lutz concealed affliction with angina pectoris (which he did not *know* that he had,

hoped and *prayed* that he did not have, and *tried* to avoid by following the best medical advice he could secure) when he was constrained to rely and depend upon expert medical advice for diagnosis and such expert medical advice (to wit, that of Dr. Rosenfeld, a heart specialist), in lieu of diagnosis, had and furnished only "tentative" judgment of "suspicions" or "probability."

II.

The California Insurance Code Imposes Upon the "Insurer" the Duty of Making Investigation of That Which It Has "the Means of Ascertaining" and Which "in the Exercise of Ordinary Care" It "Ought to Know." It Is "Presumed" and "Bound to Know" That Which Is "Equally" Open to Its "Inquiry." Its Right to Information of the Material Facts Is "Waived" by Its "Neglect to Make Inquiries as to Such Facts," Particularly "Where They Are Distinctly Implied in Other Facts of Which Information Is Communicated."

Appellee, at page 22 of its brief, urges that it was under no legal duty to investigate. It makes this argument by incongruous analogy to *Twining v. Thompson,* 68 Cal. App. (2d) 104, which is not an insurance case, and to the contrary involves a long unapprehended fraud of a fiduciary and the court in that case merely held, as to the trusting and unsuspecting plaintiff partner who was defrauded, that "* * * the mere fact that a means of acquiring knowledge is available to plaintiff and he has not made use of such means does not," in that character of situation, "debar plaintiff from recovering after he makes

the discovery. * * * Innocent parties do not carry the burden of inquiry. * * *."

The difference in the relation between the ("applicant for") purchaser of insurance and the ("insurer") vendor thereof, on the one hand, and, on the other, the fiduciary relationship between copartners (as is involved in the *Twining v. Thompson* case, *supra,* from which appellee's inappropriate and misleading above mentioned quotation is taken), is obvious. The law with respect to *investigative* duty is not the same in the situation present in this case which involves the "applicant for insurance" (appellant) and the "insurer" (appellee), as it is as between copartners who are fiduciaries as to each other and thus are not dealing "at arm's length." It is obvious that appellee is totally without authority in support of its argument in this connection by reason of its having cited and quoted an excerpt from such an inappropriate reference as is the *Twining* case, *supra.*

In addition to the case law on the subject, a statutory duty of investigation is imposed upon the insurer by California Insurance Code, Sections 332, 333, 334 and 336, as follows:

By No. 332, entitled "Required Disclosures," the insurer must investigate, *i. e.,* ascertain, "all facts" which it has "the means of ascertaining" inasmuch as the other party to the insurance contract, the *applicant for insurance* (appellant), is only required to communicate to the *insurer* such material facts "within his knowledge" as to which he makes no warranty and which the insurer

> *"has not the means of ascertaining."* (Emphasis added.)

Adding emphasis, we quote *California Insurance Code,* Section 332, in full as follows:

> "*Required Disclosures.* Each party to a contract of insurance shall communicate to the other, in good faith, all facts *within his knowledge* which are or which he believes to be material to the contract and as to which he makes no warranty, *and which the other has not the means of ascertaining.*"
>
> 332 *California Insurance Code.*

NOTE:

Abe Lutz' waiver of privilege and express authorization for full disclosure invested the appellee "insurer" with "the means of ascertaining" all facts which it now claims were concealed from and misrepresented to it.

By Section 333, entitled "Matters Not Required to Be Disclosed Except Upon Inquiry," the *applicant for insurance* (appellant), except in answer to the inquiries of the *insurer* (appellee), is not bound to communicate information of matters which, in the exercise of ordinary care, the *insurer* ought to know or as to which the *insurer* "waives communication." Adding emphasis, we quote in part *California Insurance Code,* Section 333, as follows:

> "Matters Not Required to Be Disclosed Except Upon Inquiry. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:
>
> 1. Those which the other knows.
> 2. Those which, *in the exercise of ordinary care,* the other *ought to know,* and of which the party has no reason to suppose him ignorant.
> 3. Those of which the other waives communication

4. * * *

5. * * *."

333 *California Insurance Code.*

By Section 335, entitled "Presumed Knowledge," the *insurer* (appellee) is "bound to know" all the matters which may affect the perils contemplated, and which are "open" to its inquiry "equally" with that of the *applicant for insurance* (appellant). Adding emphasis, we quote in part *California Insurance Code,* Section 335 as follows:

> "Presumed Knowledge. Each party to a contract of insurance is *bound to know*:
>
> (a) All the general causes which are *open to his inquiry equally with that of the other,* and which may affect either the political or material perils contemplated.
>
> (b) * * *."
>
> 335 *California Insurance Code.*

NOTE:

It should here be observed that the matters allegedly misrepresented as well as those allegedly concealed by Abe Lutz (there is no allegation that appellant misrepresented or concealed anything) were open to the *insurer's* (appellee's) "inquiry equally with that of" the *applicant for insurance* (appellant). In fact, such matters were more open to *insurer's* (appellee's) inquiry inasmuch as appellee was (and appellant was not) armed and implemented with Abe Lutz' said waiver of privilege and express authorization for full disclosure, and the name and address of Dr. Maurice H. Rosenfeld.

By Section 336, entitled "Waiver of Right to Information," the *insurer* (appellee) "waived" its "right to information of material facts" which it claims were concealed from it by its "neglect to make inquiries as to such facts," particularly as is true in the instant case at bar, where such facts were "distinctly implied in other facts of which information [was] communicated." Adding emphasis, we quote in part *California Insurance Code,* Section 336, as follows:

> "Waiver of Right to Information. The *right* to information of material facts may be *waived* * * * *by neglect to make inquiries* as to such facts, where they are distinctly implied in other facts of which information is communicated."
>
> 336 *California Insurance Code.*

NOTE:

All "information of material facts" which appellee claims was concealed from or misrepresented to it was "distinctly implied" in the following "other facts of which information" was "communicated" to appellee:

1. That Abe Lutz had:
   (a) been declined for insurance. [Question 28 of Part II; I, 44; II, 406];
   (b) been suspected of having sugar or albumen in his urine [Question 37 of Part II; I, 44; II, 406];
   (c) lost 15 pounds in weight in then recent months [Question 32 of Part II; I, 44; II, 406];
   (d) consulted and had physical examination by Dr. Maurice H. Rosenfeld of 1908 Wilshire Blvd. in Los Angeles during the then preceding August, 1942, then less than three months earlier [Question 36 of Part II; I, 44; II, 406];

2. That Dr. Rosenfeld was a heart specialist and checked Abe Lutz' heart [I, 218];

3. That Abe Lutz had a history of diabetes [I, 216];

4. That Abe Lutz had been rejected for insurance on account of sugar in his urine [I, 216];

5. That appellee's medical examiner had examined Abe Lutz several times previously [I, 216].

Knowing that Dr. Rosenfeld was a heart specialist, that he had checked Abe Lutz' heart and given him a physical examination, together with a blood sugar determination, together with Abe Lutz having been declined for insurance on account of sugar in his urine, and having a history of diabetes, "distinctly implied" that Dr. Rosenfeld was in possession of information of facts material to a proper determination of the physical condition of Abe Lutz which also implied that Dr. Rosenfeld had properly taken a history from Abe Lutz. All "information of material facts" which appellee claims was concealed from or misrepresented to it were ultimately elicited from Dr. Rosenfeld. Even the information elicited from Dr. Seech, over appellant's objection upon the trial of this case, was known to Dr. Rosenfeld.

It follows therefore by the provisions of *California Insurance Code,* Sec. 336, that appellee "waived" its "right to information of material facts" which it claims were concealed from it, by its "neglect to make inquiries as to such facts" inasmuch as such facts were "distinctly implied" in other facts of which information was "communicated" to it.

California Insurance Code, Sec. 336.

III.

No False Representation Was Made and Nothing Was Concealed From Appellee.

Ample treatment of this point is contained in appellant's opening brief and particularly under subdivision "(h)" thereof, pages 53 to 61 both inclusive, to which reference merely is made to avoid reiteration. Additionally, however, it should be observed that "concealment" is defined by California Insurance Code, Sec. 330, as

> neglect to communicate that which a party *knows* and *ought to communicate.*

Further, appellant was not under any duty to disclose any facts which appellee had "the means of ascertaining,"

> *California Insurance Code,* Sec. 332.

or, except in answer to specific inquiry, any facts which "in the exercise of ordinary care" appellee ought to have known or ascertained,

> *California Insurance Code,* Sec. 333

or, any facts concerning information to which appellee waived its right by its "neglect" to make inquiry.

> *California Insurance Code,* Sec. 336.

There were no false representations as is clearly demonstrated in the above mentioned subdivision of appellant's opening brief, mere reference to which is again made to avoid reiteration.

The above mentioned Insurance Code sections are relatively well amalgamated into succint form in the case of

Columbia Nat'l Life Ins. Co. v. Rodgers, 116 F. (2d) 705, 707, where it is said that:

> "An insurance company may be charged with knowledge of facts which it ought to have known. See, Supreme Lodge K. P. v. Kalinski, 163 U. S. 289, 16 S. Ct. 1047, 41 L. Ed. 163. Knowledge which is sufficient to lead a prudent person to inquire about the matter, when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed."

IV.

Appellant, Neither in Fact Nor in Legal Contemplation, Adopted "As His Own" the Statements of Abe Lutz in Part II.

Appellee grudgingly concedes that the only parties to the insurance contract involved in this case are appellee, as the "insurer," and appellant, as the *assured.* Obviously the deceased Abe Lutz, as the so-called "insured," *waived* certain rights (when he signed the waiver of privilege and express authorization for full disclosure), but in so doing he acquired no rights. Abe Lutz appears in this transaction as simply the *life* (not the individual) insured, *i. e.,* the contract or policy was *"about"* him but not "with" him. His death merely furnished the contingency upon which the liability of the *appellee* insurer to the assured *appellant* was made to depend.

Appellee apparently concedes this, or at least makes no argument and cites no authority to the contrary. Appellee seeks to cover its default on this issue by argument supported by neither authority nor logic, that appellant (on

11-14-42) adopted as his own the (11-16-42) statements of Abe Lutz in Part II because:

1. The policy provides that "all statements made by the insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties"; and

2. Appellant, in signing the application (Part I) on November 14, 1942 (2 days before Abe Lutz, as the only signer thereof, signed Part II on November 16, 1942), agreed that Part II (then in blank and unsigned) should "become a part of every policy issued" on said application (Part I).

This argument, if it may be called "argument," involves a *non-sequitur*. No one would claim that appellant *adopted as his own* the statements of Charles Dickens if the application (Part I) had contained an agreement that Charles Dickens' Christmas Carol should become a part of every policy issued on said application (Part I). In further illustration of that which we submit is an illogical conclusion which appellee seeks to establish in this connection, it may be further observed that if the policy had provided that all statements made by Charles Dickens or in his behalf, in the absence of fraud, should be deemed representations and not warranties, the fact would remain that whether the statements were representations or warranties they would nonetheless be the representations or warranties of Charles Dickens and not the representations or warranties of the applicant for insurance.

No where in the application, and no where in the policy is there any provision whereby appellant adopts the statements of Abe Lutz as his own statements. There is no evidence in the record to even indicate that appellant had

any personal knowledge of any material fact falsely stated to or concealed from appellee. Neither the contract of insurance nor the law provides that the policy can be vitiated by appellee by reason of the false representations or the concealment of any one who is not a party to the contract of insurance.

No where in the law can be found any principle of either law or equity which provides that, in the absence of express agreement, contracting parties as between themselves will be bound or their contractual relationship be affected by the statements, warranties, representations, or conduct of any non-contracting party or parties. Certainly, in the case at bar, appellant has found no principle of law or equity, and appellee has cited none, which assert that under facts such as those in the instant case appellant, as a matter of law, is deemed to have adopted as his own the statements of Abe Lutz contained in said Part II.

V.

Appellee Cannot Have Its Cake and Eat It Too.

Appellee continues to stand on the insurance contract in suit simultaneously repudiating it. It continues to urge that the express waiver of privilege signed by Abe Lutz became an integral part of the contract of insurance which it has, in and by *its* action in the instant case, sought to and succeeded, to date, in cancelling, rescinding and repudiating as *void*. In its brief it even seeks to justify its inclusion of the express waiver in the insurance contract by a quotation from *Wigmore* which, in part, is as follows:

> "* * * Since the contract of insurance is a voluntary transaction for both parties, the insurer's insist-

ence on a provision of this sort in his contract is no more than a reasonable measure of self protection. * * *."

Without citation of authority, appellee then proceeds to try to "brush off" by characterizing as "novel and ingenious" appellant's quotation (at page 34 of its opening brief) from *Grant v. Sun Indemnity Co.* (1938), 11 Cal. (2d) 438, 440, to wit:

> "The insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit."

It is respectfully submitted that after appellee has made the waiver a part of and it has become merged into the contract of insurance by the very terms of the contract, appellee, as the insurer, may not repudiate the policy, deny all liability thereunder, and at the same time stand, or be permitted to stand, on any provision inserted therein for its benefit.

Austin v. Hallmark Oil Co. (1943), 21 Cal. (2d) 718, 727 (5);

Grant v. Sun Indemnity Co. (1938), 11 Cal. (2d) 438, 440.

VI.

Appellee Concedes That the Testimony of Attending Physicians of Abe Lutz With Respect to the Latter's Statements to Said Physicians, Including All Subjective Symptoms, Were Hearsay as to Appellant.

Appellee concedes that the complaints and statements of Abe Lutz to his attending physicians, Drs. Rosenfeld and Seech, including all subjective symptoms, were hearsay as to appellant. Appellee merely urges, at page 29 of its brief, that:

> "* * * the testimony of these physicians concerning their observations of the insured, their objective findings and their diagnosis was not hearsay."

Appellee confirms its concession that hearsay was erroneously admitted in this case by asserting, without citation of authority, that the statements of Abe Lutz to his attending physicians as to his history, complaints and symptoms, were a part of the *res gestae*. Appellee does cite and quote from *Wigmore* in this connection, but only to the effect that exclamations of physical pain which do constitute a part of the *res gestae* constitute the oldest and "most fully and clearly reasoned out" exception to the hearsay rule.

All of the facts which appellee claims were falsely represented to or concealed from it were, or were based upon, subjective symptoms. Appellee tries to ignore this

by the following sweeping comment at page 30 of its brief:

> "Moreover, the insured's declarations were admissible to prove his knowledge of material facts concerning his health, *which facts were fully established by other evidence.*" (Emphasis added.)

Prompted by the italicized portion of the last above quoted excerpt from appellee's brief, appellant asks appellee the oratorical question: What facts *material to the issues in this case* "were fully established" by evidence other than statements of Abe Lutz to said attending physicians, including statements by Abe Lutz as to his subjective symptoms?

Truth is implicit in the last above quoted statement from appellee's brief, to wit: It is true that it is not enough to prove "knowledge" without establishing the fact with respect to which proof of "knowledge" is pertinent. This is apropos of appellee's reference to the testimony of the witness Ludden which was admitted over appellant's objection only for the purpose of showing knowledge. Knowledge itself without substantial showing of other facts is not sufficient to support the finding of false representation or concealment. The trial court expressly limited the testimony of the witness Ludden to the establishment of knowledge of Abe Lutz., *i. e.,* knowledge of pain. Evidence admitted merely for the purpose of showing *knowledge* cannot be later extended to supply the lacking element of competent evidence to establish the *facts* of which only knowledge has been proved.

VII.

The Defenses of Waiver and Estoppel Compel Reversal of the Trial Court's Judgment.

Appellee does not answer and makes no serious attempt to answer appellant's discussion of the evidence and authorities with respect to the defenses of waiver and estoppel. The cases cited by appellee with respect to waiver and estoppel at pages 20 to 25 both inclusive of its brief are merely inapplicable to the facts in this case. The *Twining v. Thompson* (68 Cal. App. (2d) 104), case which we have previously discussed, does not even have anything to do with the law of insurance and is totally inapplicable. The insurance cases cited by appellee involve, in each instance, facts which are totally different from those in the case at bar.

The substance of appellee's effort to answer appears to be that unless appellee had *knowledge* of the validity of the representations, the defenses of waiver and estoppel are inapplicable. This assertion ignores the special uncontroverted facts as shown by the undisputed evidence in this case and the law applicable thereto. Appellee has made no criticism of appellant's statement of the facts bearing on this phase of the matter. Clearly, appellee, under the sections of the California Insurance Code hereinabove cited, is chargeable with knowledge of the facts which it had "the means of ascertaining." Clearly too, the other party to the insurance contract is not bound to communicate information of matters which the insurer, in the exercise of ordinary care, ought to know, and the insurer's failure under such circumstances to ascertain such information constitutes its waiver of its right to such information. Knowledge which is sufficient to lead a prudent

person to inquire about the matter, when it could have been conveniently done, constitutes notice of whatever the inquiry would have disclosed.

> *Columbian Nat'l. Life Ins. Co. v. Rodgers,* citing *Supreme Lodge, K. P. v. Kalinski,* 163 U. S. 289; 41 L. Ed. 163.

Furthermore, appellee, by failing to differentiate the instant case from the *Turner* case, has by implication confessed the application of the doctrine of waiver and estoppel therein applied to the parallelling facts involved in this case. In the *Turner* case, as in this case, the insurer made no investigation when it was furnished with the names of the attending physicians of the insured and issued its policy and accepted the premiums, thus lulling the policyholder into believing that the policy of insurance was a valid and subsisting contract between the parties. Under those facts, the court in the *Turner* case (13 Cal. App. (2d) 573), did not hesitate to and did apply the doctrine of both waiver and estoppel.

The ease with which appellee could have investigated and ascertained the information with respect to the facts which it claims were concealed from and misrepresented to it, is demonstrated by the self-evident fact that appellee's agent, Harold Morgan, did contact the office of Dr. Rosenfeld before delivery of the policy to appellant, but for reasons satisfactory to Mr. Morgan, he did not personally talk to Dr. Rosenfeld [I, 147]. Dr. Rosenfeld testified that no one on behalf of the appellee ever contacted him until after the insured's death [I, 148]. Dr. Rosenfeld further testified that all of the information concerning which he testified in open court was available to

appellee prior to the death of Abe Lutz. Certainly if inquiry had been made of Dr. Rosenfeld before issuance of the policy, all of the information which the appellee now claims was concealed from or misrepresented to it by Abe Lutz could have been conveniently and easily ascertained.

Additionally, estoppel is predicated upon appellant's change of position in reliance upon the validity of the policy in suit. In reliance thereon appellant cancelled, to his financial prejudice, other policies on the life of Abe Lutz, his father [I, 187-188]. Further, appellee, without complaint or investigation, accepted from appellant two annual premiums.

The language in the *Turner* case is so pointed as applied to the conduct of appellee in the instant case, particularly as applied to the defenses of estoppel and waiver, that we quote from page 578, as follows:

> "Defendant had placed at its disposal the exact source from which it could obtain the information which it now maintains was withheld from it. It did not choose to make any inquiry but issued its policy with extreme promptness to say the least, and accepted deceased's money for six years, during all of which time defendant led her to believe she had a valid and enforceable policy of insurance on her life. Under such circumstances defendant should not be permitted to come into court after death had sealed the insured's lips and prevented her from explaining, if she could, why she did not mention an operation in 1926 when she did mention an illness and treatment by physicians which, we conclude from

> the evidence and proffer of proof, occurred at the same time as the operation. The illness and some treatment though not the correct organ involved, were disclosed, and only the fact of an operation to effect a cure was withheld."

That there was a *duty* to *investigate* in this case, as in the *Turner* case, in view of the knowledge possessed by appellee, is stated by the court in the following language:

> "As defendant made no investigation when it should and could have, and as it issued its policy of insurance, accepted Mrs. Turner's money for six years and lulled her into the secure belief that she had a valid policy of life insurance, it must be held that it *waived* the misstatement in the application and is now *estopped* from asserting the purported fraud." (Emphasis added.)

The case of *Gates v. General Casualty Co. of America* (120 F. (2d) 925), cited by appellee at page 20 of its brief, does not involve the special facts presented in the instant case by which knowledge of the insured's health and other factors were brought to the knowledge of the insurer which was thus put on notice. Neither *Telford v. N. Y. Life Ins. Co.,* 9 Cal. (2d) 103, *Frederick v. Federal Life Ins. Co.,* 13 Cal. App. (2d) 585, nor *Maggini v. West Coast Life Ins. Co.,* 136 Cal. App. 472, involve facts similar to those in the instant case. It is significant too that appellee has failed to comment upon sections 332, 333, 335 and 336 of the *California Insurance Code* pertaining to the waiver of its right to information of material facts (which it claims were misrepresented to and concealed from it) by its neglect to make inquiries as to such facts

where they were distinctly implied in other facts of which information was communicated.

Even assuming (without conceding, because the law clearly is to the contrary) that appellee was under no duty to make any investigation, nevertheless, it affirmatively appears that appellee did not rely upon the adequacy or accuracy of the answers of Abe Lutz in said Part II, and on the contrary sought, through its Los Angeles "general agents" [I, 271], to obtain information concerning:

1. Why Dr. Lissner (a doctor whose name was not mentioned by Abe Lutz in Part II) was consulted?
2. Why Dr. Rosenfeld was consulted?
3. What were the symptoms?
4. What were the findings?
5. What treatment or advice was given?
6. What were the results [II, 432].

In other words, appellee, by its own interpretation of the answers of Abe Lutz in Part II, felt that they were inadequate, or in any event appellee was concerned to the point that it desired and requested "full details" in this regard [II, 432] which obviously appellee must therefore have felt that it did not have. This request of appellee was made to its "general agents" in Los Angeles simultaneously and concurrently with its letter [II, 432] in explanation of its telegram [II, 427] to its general agents in Los Angeles dated December 1, 1942, advising that the issuance of the policy in suit was approved but that appellee was unable to consider two requested additional policies on the life of Abe Lutz without a more complete answer to the questions in Part II.

Having initiated an investigation and thus been "on inquiry," appellee is chargeable with knowledge of whatever such an investigation would have revealed and it cannot defend itself merely by saying that its Los Angeles general agents carelessly and negligently failed to make the requested investigation. The policy was thereafter delivered to appellant (not delivered to Abe Lutz) and appellant paid and appellee received and retained two annual premiums thereafter. The evidence upon the trial of the instant case was so strong in favor of the negligent and abortive investigation made by appellee that the following appears in Paragraph XXIII of the findings of fact:

> "It is true that plaintiff's representatives *contacted* the office of the *physician* of said *insured,* but it is not true that they obtained, or that plaintiff had the opportunity of obtaining, full, true or correct information from such physician regarding the physical condition and health of said insured." (Emphasis ours.)

The latter portion of the above quoted finding can be no stronger than the uncontraverted evidence which was to the effect that appellee had not contacted Dr. Rosenfeld [I, 146-148] but that Dr. Rosenfeld, had he been contacted by appellee, would have made available to appellee all of the evidence and information (disclosed at the time of the trial), which appellee now claims to have been withheld from and misrepresented to it.

Conclusion.

We respectfully submit that appellant has demonstrated that the trial court erred in the respects herein and in the opening brief enumerated, and that the judgment should be reversed.

Respectfully submitted,

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